PERFORMANCE OF AN EXISTING OBLIGATION AS CONSIDERATION FOR A PROMISE.—The dictum that if there be nothing in a rule flatly contradictory to reason the law will presume it to be well founded, and that the office of the judge is *"jus dicere* and not *jus dare"*, is responsible for much agony of construction and tortious logic on the part of courts torn by desire to evade it in the interest of modern ideas of right. There is a trilogy of accepted legal principles which it has been particularly difficult for the courts to adhere to in spirit or to repudiate in letter. They are the propositions, that for a promise to be enforcible a consideration must emanate from the promisee, that doing what one is already legally bound to do is not a consideration, and that one is legally bound to perform a contract according to its terms. In other words, doing what one has already contracted to do is not consideration for a promise made on condition or in contemplation of such performance. Under this rule, if A. has contracted to do something for B., his actual performance of that promise can not be consideration for a new pormise by B. or a collateral promise by C. There is no lack of real application of the rule. *Stilk* v. *Myrich,* 2 Camp. 317; *Frazer* v. *Hatton,* 2 C. B. N. S. 512; *Harris* v. *Carter,* 3 E. & B. 559; *Bartlett* v. *Wyman,* 14 Johns. (N. Y.) 260; *Seybolt* v. *N. Y., L. E. etc. R. R.,* 95 N. Y. 562; *Village of Seneca Falls* v. *Botsch,* 149 N. Y. Supp. 320; *Ayers* v. *Chicago etc. R. R. Co.,* 52 Iowa 478; *Conover* v. *Stillwell,* 34 N. J. L. 54; *Reynolds* v. *Nugent,* 25 Ind. 328; *Vance* v. *Ellison,* 76 W. Va. 592; *Muir* v. *Morris,* 80 Ore. 378; *Vanderbilt* v. *Schreyer,* 91 N. Y. 392; *McDevit* v. *Stokes,* 174 Ky. 515.

But while courts feel constrained to follow the rule, they have not been hesitant in condemning it as unsuited to modern ideas. They "have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness or honesty". *Jaffray* v. *Davis,* 124 N. Y. 164. So also Mr. Ames, 12 HARV. L. REV. 515, 521; *Foakes* v. *Beer,* 9 App. Cas. 605; *Harper* v. *Graham,* 20 Oh. 106. One court, at least, "profoundly and painfully impressed with the slavish adherence of the legal and judicial mind to precedent, or, in many cases, to what seems to be precedent only", flatly denied, so far as payment of money is concerned, that doing what one is legally bound to do is not consideration. *Clayton* v. *Clark,* 74 Miss. 499. Mr. Justice Holmes, in revolt against imitation of the past as the basis of modern law, evades the rule, unofficially, by denying that one is legally bound to perform a contract according to its terms. 10 HARV. L. REV. 457, 462; THE COMMON LAW, pp. 300 ff. The court in *Frye* v. *Hubbell,* 74 N. H. 358, takes the same view officially.

These, however, are unusual instances. Other courts, while they evince willingness to escape application of the rule, recognize its existence and binding force, and evade it only when they can do so on some plausible distinction or more or less specious assumption. Thus, a number of cases hold the making of the new promise to be sufficient evidence of mutual rescission of the first contract. On this assumption, the original contractor is no longer bound by that agreement and his doing what he had originally promised, or promising a second time to do it, is of course a consideration for the contractee's new promise. *Stewart* v. *Keteltas,* 36 N. Y. 388; *Linz* v. *Schuck,*

106 Md. 220; *Agel* v. *Patch Mfg. Co.*, 77 Vt. 13; *Thomas* v. *Barnes*, 156 Mass. 581. Sometimes, without denying that a contractor is legally bound to perform according to the terms of the contract, courts, paradoxically, hold that his actual performance instead of mere payment of damages for non-performance is a consideration for the new promise. *Lattimore* v. *Harsen*, 14 Johns. (N. Y.) 330; *Goebel* v. *Linn*, 47 Mich. 489; *Bishop* v. *Busse*, 69 Ill. 403. Other courts say that performing according to existing contract instead of exercising an opprtunity to go into bankruptcy is consideration for the new promise. *Melroy* v. *Kemmerer*, 218 Pa. 381; *Engbretson* v. *Seiberling*, 122 Iowa 522. But on the whole, American courts adhere to the principles established. Even the courts which evade their application make assumption, as pointed out, that the prior obligation has been rescinded, or otherwise escape from taking the position that there is no legal obligation to perform a contract according to its terms.

The extra cog in the wheels of logic by which consideration is explained is the case of *Shadwell* v. *Shadwell*, 30 L. J. C. P. 145, and the English doctrine based upon it. In that case the performance by one person of what he was already under contract to do, was held to be consideration for a third person's promise to him. Every writer who has not ignored this case has taken his turn at condemning, harmonising or explaining the decision according to his own ideas. No one has succeeded in making it harmonise with both principles, that doing what one is already legally bound to do is not consideration, and that one is legally bound to perform a contract according to its terms. But this is an English case and the trilogy of principles was saved in this country by the fact, to quote Mr. Williston, that "the almost uniform current of authority in this country is that neither performance nor promise of performance of what one is already bound to do by contract with a third person, is a sufficient consideration to support a promise."

The Court of Appeals of New York, however, has just dammed this current of authority by its decision in the case of *Cicco* v. *Schweizer*, handed down November 13, 1917, Daily Record (Syracuse) Dec. 10, 1917. It appears from the case, that in 1902 one Count Oberto Gulinelli was engaged to marry Schweizer's daughter. Four days before the marriage was to take place Schweizer promised in writing to pay to the daughter the sum of $2,500 annually while both he and she should live. The daughter and her husband assigned this promise to the plaintiff who sued for the installment for the year 1912, which Schweizer had refused to pay. The written agreement reads, "Whereas, Miss Blanche Josephine Schweizer, * * * is now affianced to and is to be married to the above said Count Oberto Giacomo Giovanni Francesco Maria Gulinelli, now, in consideration of all that is herein set forth the said Mr. Joseph Schweizer promises and expressly agrees by the present contract to pay" the sum named. From statements of the court it appears that the promise was made to the Count only, although, the court says, it was intended for the benefit of the daughter and she might have sued upon it. There is nowhere in the agreement any indication that the engagement between the daughter and her count had been broken or was about to be rescinded, and the court explicitly states that neither of the parties

to the marriage promised the father anything. The court seems to say that the consideration was the fact that the parties to the existing marriage contract did not mutually rescind it. Had the promise run to boh of them the differentiation from *Shadwell* v. *Shadwell* might have been well taken. But it ran to the Count alone. The daughter was not a party to the father's agreement, and that she should refrain from acquiescing in a dissolution of her agreement with the Count was a condition, not a consideration. To hold the act of a third person, to whom no promise has been made, to be a consideration would be entirely out of harmony with the idea of reciprocation between the promise and the consideration, the idea of "exchange" of promises or of a promise for an act that is found in every definition of consideration. There is no authority prior to the principal case for disregarding the necessity of reciprocation. The sole consideration, therefor, was the performance by the Count of the contract of marriage by which he was already bound at the time of the defendant's promise. The court holds that the parties married not because they had agreed to do so, but because the father had promised to give the daughter $2,500 per year if they should do so.

This comes perilously close to giving the doctrine of *Shadwell* v. *Shadwell* American authority, and it does drop an obstruction in the course of our logic. While the decision stands as sound, either the happening of an event extraneous to the promisee's volition may be a consideration, or one is not legally bound to perform an existing contract, or doing what one is already legally bound to do may be consideration for a new promise. Either our established notions of consideration as something within the promisee's volition and emanating from him are upset by the case, or it is fresh authority for the proposition that *any* act of the promisee induced by the promise, and intended to be so induced, is consideration for the promise. 14 MICH. L. REV. 570.

J. B. W.

ACQUIRING JURISDICTION WITHOUT PERSONAL SERVICE, SEIZURE OR AID OF STATUTE.—It is often assumed that courts can acquire jurisdiction only by personal service to give jurisdiction *in personam*, or by a seizure to give jurisdiction *in rem*; but it is not so. The assumption is induced no doubt by the fact that in the ordinary common law actions jurisdiction is acquired in that way. Mr. Justice Field very distinctly pointed out in the case of *Pennoyer* v. *Neff* (1877), 95 U. S. 714, that it was not the fact that the land was not seized that rendered the judgment void. It was the fact that the land was not the *res* in litigation in the prior case that made the judgment void.

Laying aside the common law actions of writ of error, certiorari, and the like, in which superior courts always acquired jurisdiction without any personal service or seizure, as being in their nature rather continuations of prior actions in other courts, than a grasp of fresh jurisdiction; no such explanation can be made to justify the fact that courts of probate and administration have from the earliest history of the common law to the present time taken jurisdiction without either of these supposed requisites. Someone suggests